Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

CHEROKEE INSURANCE COMPANY, by and through DAVID S. WEED, Special Deputy Commissioner of Commerce and Insurance for the Rehabilitation of Cherokee Insurance Company,
Plaintiff-Petitioner,

v.

E.W. BLANCH COMPANY, et al.,
Defendants-Respondents.

Petition For A Writ Of Certiorari From The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Defendant E.W. Blanch Company ("Blanch"), a reinsurance intermediary, was negligent and\or breached its contract with Plaintiff Cherokee Insurance Company ("Cherokee"), the primary insured, by placing Cherokee's business with three reinsurers - Mission Insurance Company ("Mission"), Mutual Fire Marine and Inland Insurance Company ("Mutual Fire") and Transit Casualty Company ("Transit") - who subsequently became insolvent.

PARTIES TO THE PROCEEDINGS AND LIST OF PARENT COMPANIES

The names of all the parties are Blanch and Blanch's general partners, E. W. Blanch, Jr., Michael W. Cashman, Sr., Frank S. Wilkinson, Andrew O'Brien and Clifford English. Defendant Paul Mavros was dismissed without prejudice subsequent to the filing of the lawsuit.

Cherokee is a subsidiary of the Dana Corporation, a publicly owned corporation. The Dana Corporation is not a party to the proceeding.

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Vitkowsky, Vincent T.,
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In The

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CHEROKEE INSURANCE COMPANY
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v.

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Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioner urges that a writ of certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals decided and filed September 26, 1995, in the above-entitled proceeding. That opinion is reported at 66 F.3d 117 (6th Cir. 1995), and is also set forth in the Appendix to the petition for writ of certiorari.

PROCEDURAL HISTORY AND STATEMENT OF JURISDICTION

On June 4, 1990, Cherokee Insurance Company ("Cherokee"), a Tennessee insurance company in rehabilitation filed a "Complaint" in the Chancery Court for Davidson County, Tennessee, against Defendant E. W. Blanch Co. ("Blanch"), a Delaware Limited Partnership that operates as a reinsurance intermediary or broker. Blanch's general partners, E. W. Blanch, Jr., Michael W. Cashman, Sr., Frank S. Wilkinson, Andrew O'Brien and Clifford English are also named as Defendants, and shall be referred to collectively as "Blanch". The action was subsequently removed to the United States District Court for the Middle District of Tennessee. (hereinafter the "District Court") The District Court had original jurisdiction of the case under 28 U.S.C. § 1332 based upon the existence of complete diversity of citizenship between the Plaintiff, a Tennessee corporation, with its principal place of in Tennessee, and Defendant Blanch is a Delaware limited partnership with its principal offices in Minnesota. (Defendants general partners and limited partners are all citizens of a state other than Tennessee.) And, the amount in controversy, exclusive of interest and costs, exceeds $50,000.00.

The Complaint alleges negligent breach of contract, breach of contract and tort,

contending that Blanch breached its duty to obtain financially viable reinsurers for Cherokee's business or, at a minimum, to warn and/or inform Cherokee of the financial impairment of the reinsurers Blanch was placing Cherokee's business with.

On September 30, 1991, Blanch filed a Motion for Summary Judgment and, on October 15, 1991, Cherokee responded to Blanch's Motion for Summary Judgment and contemporaneously submitted its Motion for Summary Judgment. On February 5, 1992, the Magistrate recommended that Blanch's Motion for Summary Judgment on Cherokee's claims be granted in part and denied in part. The Magistrate concluded that Blanch was not liable to Cherokee for its actions with respect to three of the five financially impaired reinsurers with whom Blanch placed Cherokee's business. However, as regards two of the financially impaired reinsurers - Universal Reinsurance Company ("Universal Re") and Mission - the Magistrate determined that material issues of genuine fact existed as to whether Blanch breached its duty or obligation to Cherokee by placing Cherokee's business with them.

On February 28, 1992, Blanch moved for reconsideration of that Report and Recommendation citing new evidence pertaining to Universal Re and Mission. In light of new evidence, Blanch renewed its Motion for Summary Judgment. Cherokee also moved to

reconsider the Report and Recommendation and renewed its Motion for Summary Judgment. However, Cherokee dismissed its claims against Blanch as to all reinsurance placements with Universal Re and its parent, Northwestern National Insurance Company ("Northwestern").

On February 26, 1993, the Magistrate recommended in light of the new evidence and Cherokee's dismissal of its claims against Blanch regarding Universal Re and Northwestern that Blanch's Motion to Reconsider be granted and further that Blanch's Motion for Summary Judgment be granted with respect to all of Cherokee's claims against Blanch.

Thereafter, on December 20, 1993, U.S. District Judge Echols accepted the Magistrate's Report and Recommendation of February 26, 1993, in full and thereby ordered that Blanch's Motion for Summary Judgment with respect to all of Cherokee's claims be granted.

On January 5, 1994, Cherokee timely filed its Notice of Appeal with the Sixth Circuit Court of Appeals. The Court of Appeals had jurisdiction as a result of the District Court's order of December 20, 1993, granting Blanch's Motion for Summary Judgment with respect to all of Cherokee's claims. On September 26, 1995, the Court of Appeals filed an opinion affirming the judgment of the District Court in favor of the

Defendants. This Petition for Certiorari is being timely filed within 90 days of the Court of Appeals Opinion.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) 1988.

STATEMENT OF THE CASE

As pointed out in the preceeding section, the District Court for the Middle Section of the State of Tennessee had original jurisdiction of this case under 28 U.S.C. § 1332.

The facts relevant to the questions presented to this Court for review may be summarized as follows. Cherokee is an insurance company incorporated and authorized to do business in the State of Tennessee. Cherokee was placed in rehabilitation on July 17, 1984, by Order of the Chancery Court, of Davidson County, Tennessee. Blanch is a professional reinsurance intermediary or broker doing business nationally and internationally, with its central offices in Minnesota. (See Complaint, p. 1, and Answer p. 2, Appendix hereto).

Blanch served as Cherokee's primary reinsurance broker/intermediary from the late 1960's until 1985. (See Complaint, p. 4, Appendix hereto). Cherokee, as a small insurance company without the staff and capability of managing its own reinsurance, relied on and truly entrusted its reinsurance

needs to Blanch. (See Affidavit of Billy Akin, pp. 5-8, Appendix hereto). Billy L. Akin, the Vice-President of Cherokee Insurance Company, and the reinsurance "contact" at Cherokee, described the communication between Blanch and Cherokee as being extensive during the time Blanch served as Cherokee's reinsurance intermediary. (See Affidavit of Billy Akin, p. 6, Appendix hereto). According to Mr. Akin, the practice was for Blanch to negotiate the reinsurance contracts, and subsequently, to inform Cherokee by letter of the financial security provided by the reinsurers, and ultimately to presume Cherokee's approval unless notified to the contrary. (See Affidavit of Billy Akin, pp. 6-7, Appendix hereto).

Edward W. Frye, Jr., CPCU, Vice President of Blanch and Steven M. Lonergan, CPCU, Secretary of Blanch who predominately serviced the Cherokee account were in constant contact with Cherokee. (See Affidavit of Billy Akin, pp. 6-9, Appendix hereto). Mr. Frye and Mr. Lonergan continually reiterated their expertise in and familiarity with the reinsurance market. (See Depo. of Billy Akin, pp. 330-335, Appendix hereto). A general understanding existed between Cherokee and Blanch that Blanch would place Cherokee's business with financially sound companies and companies that would, to the best of Blanch's judgment represent strong security. (See Depo. of

Billy Akin, p. 155, Appendix hereto).

In the late 1970's, one brochure Cherokee received from Blanch stated:

> Thus, as a reinsurance intermediary, E. W. Blanch assumes an all encompassing role, providing sound counsel, designing and negotiating reinsurance programs and placing reinsurance with strong, responsive reinsurance markets. Those programs are monitored on a continuous basis with subsequent recommendations for changes, which not only reflect client's needs, but also reflect availability of new coverages in the reinsurance market place. (See Blanch Brochure, p. 4, Appendix hereto).

Cherokee's expert witness, Bernard Webb, an actuarial and reinsurance consultant, emphasizes the importance of how the intermediary represents itself to the client. In his deposition, he stated:

> Q. So it is your testimony that it is the custom within the reinsurance brokerage community to accept delegation of the function of analyzing reinsurance companies on behalf of the ceding company so

> that the ceding company doesn't have to do it itself, is that right?
>
> A. It is my testimony, if a reinsurance broker holds himself out as being qualified to advise his ceding company clients with regard to the placement of insurance that he has, in fact, accepted the responsibility for analyzing the reinsurance. (See Depo. of Bernard Webb, p. 43-44, Appendix hereto).

Mr. Webb further stated in his deposition regarding the role of the reinsurance intermediary and the necessity of the security analysis:

> ...Their function is to advise an insurance company on its reinsurance requirements and to do what they have to do the understand the effect of reinsurance on the financial operations of the insurance company, and therefore, if they have performed their function properly, they of necessity, have to understand the financial operations of insurance companies, much more so than a typical direct

> agent or broker. (See Depo. of Bernard Webb, p. 19).
>
> ...I think that the reinsurance broker has an obligation to analyze the condition of the companies in which he places business for his ceding companies, barring of course, some contractual statement to the contrary. (See Depo. of Bernard Webb, pp. 97-98, Appendix hereto).

Literature being circulated during the 1980 to 1984 time period concurs with Mr. Webb's understanding of the role of the reinsurance broker/intermediary. For example, Guy Carpenter, a reinsurance broker/intermediary comparable to Blanch and a major competitor of Blanch, prepared and circulated in February of 1983 a memorandum on the issue of "Reinsurance Security." The cover letter which was attached to the "Reinsurance Security" memorandum states: " We at Guy Carpenter continue to place great emphasis on the issue (reinsurance security) and in recognition of our responsibilities in this area, have prepared the attached memorandum on Reinsurance Security for your information." (See Cover letter to Reinsurance Security, p. 1, Appendix hereto). The memorandum stresses the importance of the reinsurance intermediary's initial review of

reinsurers as well as the continuing review of all reinsurers stating:

> ... As reinsurance intermediaries, we are not, of course, in a position to guarantee the security of any reinsurer, however, we do fully recognize our responsibilities to assist our clients by using good judgment in carefully reviewing each of the reinsurance markets with which we place business to be certain as possible that they meet our client's requirements. When we become aware of conditions which might jeopardize the ability of a reinsurer to respond to a loss, we take immediate action to ascertain the seriousness of the conditions; including direct discussions with the reinsurer when necessary and advise our clients as promptly as possible. (See Reinsurance Security, p. 3, Appendix hereto).

The document then sets forth twelve analytical factors it perceived to be important in a prudent security review of a reinsurance market. (See Reinsurance Security, p. 4, Appendix hereto).

The trade press during the 1980 to 1984 time period also concurs with Mr. Webb's and

Guy Carpenter's understanding of the role of the reinsurance broker/intermediary. On the front page of "The National Underwriter," On December 5, 1980, appeared an article entitled "Re Brokers: Stronger Role." (See, Article "Re Brokers: Stronger Role", p. 13, Appendix hereto). This article addresses the changing conditions in the reinsurance industry at the time and described the role and duties of the reinsurance intermediary as a result thereof:

> In the United States the reinsurance intermediary enjoys a strong and growing position in the development of treaty reinsurance. The broker has drawn together in an orderly fashion reinsurance markets of adequate financial strength to create needed capacity for a variety of reinsurance arrangements. It has been his role to create or fulfill capacity needs in the development of new and existing lines of insurance, and in many cases, this reinsurance capability has allowed pioneers to have great success in new insurance products.
>
> Another role of significant importance is that of monitoring the financial integrity of new and existing markets. The broker must

> analyze financial statements of reinsurers to make certain that they are capable of insuring the kind of loss expenses which potentially can develop, particularly in catastrophic events...
>
> In a word, the broker's role in a market such as we see today is, as never before, one that may be best described as responsible. The proper cultivation of the market falls squarely on the shoulders of the professional reinsurance intermediary. He must meet this challenge with an enlightened and studied attitude for it may well be that the success or failure of the remarkable emerging reinsurance market potential in the United States will depend on the manner in which the broker performs his role as the catalyst in creating and maintaining capacity. (See, Article "Re Broker: Stronger Role", pp. 14-15, Appendix hereto).

Undoubtedly, the early 1980's were a period of unrest in the reinsurance business and intermediaries such as Blanch and Guy Carpenter were or should have been well aware

of the changing environment. (See, Article "Why the World Reinsurance Market has the Jitters", pp. 175-181, Appendix hereto). The necessity for the reinsurance broker/intermediary to financially analyze and continually monitor the financial strength of the reinsurers with whom it was placing the client's business in the midst of the changing environment was undeniably existent.

Mr. Webb, as an actuary capable of analyzing the financial statements of reinsurers, suggests several ratios and factors that were available to educate and inform a reinsurance broker/intermediary exercising reasonable care as to a given reinsurer's financial weaknesses. (See, Affidavit of Bernard Webb, pp. 4-5, Appendix hereto). Several of these ratios and factors are the same as those advocated in the Guy Carpenter memorandum.

Mr. Webb contends that if a reinsurer has over 75% of policyholder's surplus represented by reinsurance recoverables, the reinsurer may be financially troubled; and, the reinsurer's Schedule F (a portion of the reinsurer's Annual Financial Statement) should be reviewed to discern the quality of the retrocessionaires. (The reinsurers of the reinsurer). (See Affidavit of Bernard Webb, p. 6, Appendix hereto). According to the deposition testimony of Leo T. Heifetz, head of Blanch's "market security committee,"

Blanch did not test the relationship between reinsurance recoverables and policyholders' surplus and did not examine the reinsurers' Schedule F's. (See Depo. of Leo Heifetz, pp. 67-71, Appendix hereto) Mr. Webb concludes that Blanch was negligent not to do so. (See Affidavit of Bernard Webb, p. 6, Appendix hereto). If Blanch had conducted such an examination it would have known that Mission, Mutual Fire and Transit were financially troubled at the time Blanch placed Cherokee's business with them. (See, Schedule F's, Appendix hereto).

Mr. Webb further contends that if a reinsurer has over 50% of policyholder's surplus represented by investments in subsidiaries, the actual value of the subsidiaries should be examined. (See, Affidavit of Bernard Webb, p. 6, Appendix hereto). Heifetz testified in his deposition that Blanch did not examine the relationship between a reinsurer's policyholders' surplus and the reinsurer's investment in subsidiaries, and did not attempt to discern the value of any of the subsidiaries listed by a reinsurer in its financial statement. (See Depo. of Leo Heifetz, pp. 67-71, Appendix hereto). Again Mr. Webb concludes that Blanch was negligent not to do so. (See Affidavit of Bernard Webb, p. 6, Appendix hereto).

Prior to Cherokee's discovery of the Guy Carpenter document and introduction of

the document into the record, Blanch minimized its duty to conduct security analyses of reinsurance markets and depicted its analysis as quite cursory. (See Memo in Supp. of Mtn. for Summ. Jdgmt, pp. 1-2, Appendix hereto). Heifetz testified in his deposition that Blanch when examining the financial security of reinsurers looked at the following characteristics of the reinsurers: (1) staff; (2) size; (3) A.M. Best rating; (4) NAIC Early Warning Test Results; and (5) the reinsurer's annual statement. (See Depo. of Leo Heifetz, p. 29, Appendix hereto).

Subsequent to the introduction of the Guy Carpenter document, however, Heifetz submitted a Second Affidavit wherein he inconsistently expanded on the nature of the security analyses he claims Blanch was performing. (See Affidavit of Leo Heifetz, pp. 2-7 & Depo. of Leo Heifetz, pp. 29-30; Ex. 7, Depo. of Leo Heifetz, pp. 67-71, Appendix hereto).

Furthermore, in the Second Affidavit, although Blanch had continually attacked the ratios advocated by Bernard Webb as unaccepted in the industry during the 1980 to 1984 time period and as being dysfunctional, Heifetz alleged the use by Blanch of several of Mr. Webb's ratios. (See Affidavit of Leo Heifetz, pp. 2, 4-6, and Third Affidavit of Bernard Webb pp. 3-4, Appendix hereto).

Regardless of what security analyses,

if any, Blanch was performing during the 1980 to 1984 time period, Blanch placed 25% of Cherokee's Main Working Treaty (most heavily relied upon contract between Cherokee and its reinsurers) - "The Combined Property and Casualty Excess of Loss Reinsurance Treaty" - with Mission in 1982 and again in 1983 - a company Blanch knew or should have known represented poor security. (See Complaint, p. 6 & Answer, p. 5, Appendix hereto). In a Sales and Service Bulletin disseminated within Blanch dated October 29, 1980, the "Marketing Guide" defined Pacific Re (a subsidiary of Mission that acted as Mission's managing general agent) as "aggressive and cheap." (See Sales and Service Bulletin #305, p. 3, Appendix hereto). According to "Failed Promises, Insurance Company Insolvencies," a Report by the SubCommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, 105 Congress, 2nd Session, February, 1990, ("Dingell Report"), Missions' failure was the result of "poor underwriting, severe underpricing, grossly inadequate reserving, accounting gimmicks, false reporting and overall disregard for the well being of Mission and the constraints of the Marketplace." (See Dingell Report, p. 14, Appendix hereto). The Dingell Report also stated with regard to Mission, that it had a "solid reputation" and high Best Rating until it began and excessive reliance on

reinsurance around 1980. (See Dingell Report, p. 13, Appendix hereto). If Blanch had looked at the high percentage of policyholders' surplus represented by reinsurance recoverables for Mission, at the time it placed Cherokee's business, and then had analyzed the reinsurers on Schedule F, Blanch would have known Mission was financially troubled and represented poor security. (See Affidavit of Bernard Webb, p. 6, Appendix hereto). An "Order Appointing Liquidation and Restraining Order" was filed February 2, 1987, in the matter of *Insurance Commissioner of the State of California v. Mission Insurance Company*, Mission is presently not paying claims due Cherokee as a result of its insolvency. (See Order Appt. Liquid. and Rest. Order, Appendix hereto).

Furthermore, Blanch placed 50% of Cherokee's Commercial Umbrella Treaty with Transit in 1983 and again in 1984 - another company Blanch knew or should have known represented poor security. (See Complaint, p. 6 & Answer, p. 5, Appendix hereto). As early as 1982, Transit was using reinsurance excessively - in Transit's 1982 Financial Statement, reinsurance recoverables constituted 179.60% of Transit's policyholder's surplus. (See Financial Statements, p. 1, Appendix hereto). The Dingell Report pins Transit's failure on problems easily recognizable by the members of the reinsurance industry, namely

"management incompetence, excessive reinsurance and reckless expansion..." (See Dingell Report, p. 31, Appendix hereto). Transit is presently in liquidation in the matter of *Mary C. Hall, Acting Director, Division of Insurance Department of Economic Development, State of Missouri v. Transit Casualty Company*. (See Amended Order of Liquid. and Appt. of Perm. Receiver, Appendix hereto).

And finally, Blanch placed 100% of Cherokee's financial guaranty insurance program with Mutual Fire in 1983 and 1984 - another company Blanch knew or should have known represented poor security. (See Complaint, pp. 5-6 & Answer, p. 5, Appendix hereto). Mutual Fire like Transit relied excessively on reinsurers. In 1979, Mutual Fire's Annual Statement showed reinsurance recoverables were 2 and 1/2 times its policyholder's surplus. (See Financial Statements, p. 3, Appendix hereto). In a Personal Visit Report compiled by Blanch in January of 1983, following a visit to UMI (Mutual Fire Marine and Inland's Management Company), Blanch personnel stated:

> An unexpected good visit. We may have the opportunity to increase our position with this company. Adler (a UMI employee) did mention that 1982 is going to look very bad; experience apparently has

> deteriorated dramatically. There is some concern on my part about the financial viability of this company if it has to weather very severe financial storms. This is something we need to continually watch. (See Personal Visit Rep. 1/11/83, p. 2, Appendix hereto).

Also, in a Personal Visit Report, dated January 27, 1983, a Blanch employee noted regarding his recent visit with Mutual Fire: "A very pleasant meeting. I would like to do more business with these people. They seem to want to become professional reinsurers." (our emphasis) (See Personal Visit Rep. 1/27/83, p. 2, Appendix hereto). And finally, another Blanch document indicative of Blanch's concerns is a Personal Visit Report, dated January 4, 1983, wherein Blanch remarks:

> Ned (Vice president of Mutual Fire) has big plans for future and would like EWB Co.'s help. The only thing that we must be careful of is that Ned's plans aren't too big, too fact..." (See Personal Visit Rep. 1/4/83, P. 2, Appendix hereto).

Blanch nevertheless, described Mutual Fire to Cherokee as it did all other

reinsurers with whom Blanch placed Cherokee's business - "financially sound" and "good security." (See Affidavit of Billy Akin, p. 9, Appendix hereto). Presently, Mutual Fire is operating under a Plan of Rehabilitation in the matter of *George F. Grode, Insurance Commissioner of the Commonwealth of Pennsylvania v. The Mutual Fire Marine and Inland Insurance Company*, and it not paying claims due Cherokee as a result of such rehabilitation. (See Plan of Rehabilitation, Appendix hereto).

If Blanch had examined the relationship between policyholders' surplus and reinsurance recoverables of the reinsurers at issue at the time it placed Cherokee's business, and then looked to these reinsurer's Schedule F's, Blanch would have known the reinsurers were financially troubled and represented poor security. (See Affidavit of Bernard Webb, p. 6, Appendix hereto). During the 1980 to 1983 time period, when Blanch placed Cherokee's business with Mission, Transit and Mutual Fire, these reinsurers were financially impaired and represented poor security. (See Affidavit of Bernard Webb, p. 5, Appendix hereto). Mr. Webb concluded in his testimony that if Blanch had looked to information readily available to Blanch at the time, it would have determined the financial weakness of these three companies with whom it was placing Cherokee's reinsurance. (See Depo. of

Bernard Webb, p. 6, Appendix hereto).

ARGUMENT SETTING FORTH THE REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE EXISTENCE OF AND SCOPE OF THE DUTY OF A REINSURANCE BROKER/INTERMEDIARY TO FINANCIALLY ANALYZE AND MONITOR THE REINSURERS WITH WHOM IT PLACES THE PRIMARY INSURED'S REINSURANCE PROGRAM ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED

The Court of Appeals stated: "For purposes of this opinion,..., we shall assume Blanch was under a duty to exercise reasonable care in selecting the reinsurers it recommended to its clients." Not only did the Court of Appeals hesitantly recognize the reinsurance broker/intermediary's duty to exercise due care in placing reinsurance for clients but the Court of Appeals failed to address the scope of such duty. Cherokee urges for the reasons set forth herein that the existence of and scope of such duty are important issues of federal law which have not been but need to be addressed.

Reinsurance arrangements spread risks

among a number of insurers. Therefore, reinsurance is an important element in an insurer's financial planning.[1] (See Complaint, p. 3 & Answer, p. 3, Appendix hereto). The role of the reinsurance broker/intermediary, such as Blanch, is to solicit business from the ceding companies (cedents), such as Cherokee, and transfer or cede some of the insurance risks of that ceding company to various reinsurers. (See Complaint, p. 3 & Answer, p. 3, Appendix hereto). A reinsurance broker/intermediary acting with the knowledge, care and skill required by its profession will consistently be:

> (a) assisting the ceding insurer in evaluating its reinsurance needs in terms of coverage, capacity, retention and price;
> (b) soliciting, proposing and recommending to the ceding insurer a specifically designed financially adequate, and coordinated structure for its reinsurance program;

---

1 In Tennessee, our Supreme Court has defined reinsurance as an "agreement to indemnify the assured against a risk assumed by the latter in a policy issued to a third party." *Neff v. Cherokee Insurance Company*, 704 S.W. 2d 1, 4 (Tenn. 1986)

(c) adequately investigating the financial solvency of proposed reinsurers.

Vitkowsky, Vincent T., "Status and Obligations of Reinsurance Brokers and Intermediaries in the United States," 265, 274, (Law and Practice of International Reinsurance Collections and Insolvency, 1988) (See Article by V. Vitkowsky, p. 274, Appendix hereto).

Therefore, reinsurance brokers/intermediaries must by the nature of their business have an understanding of the effects of reinsurance on an insurer's finance and accounting statements in order to assist his clients in the design and execution of a reinsurance program. (See Affidavit of Bernard Webb, p. 4, Appendix hereto). The assessment of an insurer's solvency and solidity should not be beyond the abilities of a qualified reinsurance broker/intermediary. (See Affidavit of Bernard Webb, p. 4, Appendix hereto).

Blanch repeatedly equates the reinsurance intermediary with the primary insurance broker (See Memo in Supp. of Mtn. for Summ. Jdgmt, p. 2, Appendix hereto). As is discussed above, such a comparison is nonsensical. The reinsurance industry is highly complex and is much less regulated than the primary insurance industry (See Affidavit of Bernard Webb, p. 4, Appendix

hereto). Reinsurance intermediaries dealing with insurers, on the one hand, and the reinsurance market on the other hold themselves out as very specialized professionals.

The differences in the roles of the reinsurance broker and the primary insurance broker are well-recognized by members of the insurance and reinsurance industries (See Affidavit of Bernard Webb, p. 4, Appendix hereto). The courts have discussed such differences as well. In *Francis v. United Jersey Bank*, 392 A.2d 1233 (N.J. 1978) the Superior Court of New Jersey stated:

> . . . The task of the reinsurance broker is much more complicated and sophisticated than that of the ordinary retail insurance broker with whom we are all familiar in our capacities as owners of automobiles or houses. The insurance companies involved rely to a large extent on the knowledge, skill, integrity and bookkeeping of the reinsurance broker.

Blanch is well aware of the greater degree of care a reinsurance intermediary must exercise in the performance of its activities, than a primary insurance broker.

Blanch held itself out as a

professional reinsurance intermediary who could evaluate Cherokee's reinsurance needs, gather information about Cherokee to present to potential reinsurers, financially evaluate potential reinsurers and ultimately place reinsurers on Cherokee's treaties (See Affidavit of Billy Akin, pp. 7-11, Appendix hereto). Cherokee justifiably relied on Blanch's familiarity and expertise in the reinsurance realm. It is apparent that Blanch had both the financial and personnel resources to make reasonable investigations of the financial strength of the reinsurers with which it placed Cherokee's reinsurance. (See Affidavit of Bernard Webb, p. 5, Appendix hereto). Wherefore, Blanch, aware of the nature of the business, has a duty to the clients to act accordingly. *See Master Plumber's, Ltd. v. Cormany & Bird*, 255 S.W. 2d 533 (Wisc. 1977).

Cherokee insists that the views and beliefs of Guy Carpenter, Bernard Webb and the available trade press on the subject of the security analyses to be performed by the prudent reinsurance intermediary create a material factual dispute as to whether Blanch exercized due care in the placement of Cherokee's reinsurance. Cherokee tried and, not surprisingly, was unsuccessful in locating a reinsurance intermediary willing to testify as to what financial analyses if any were being performed by reinsurance brokers/intermediaries during the 1980 to

1984 time period - the exposure to liability which would accompany such testimony is easily recognized. Bernard Webb's testimony is highly competent. His testimony concurs with the security analyses propounded by Guy Carpenter as well as the ideas and views expressed in the trade press during the early 1980's.

Blanch's contentions that the ratios and factors Mr. Webb suggests were not ones upon which reasonable reinsurance brokers/intermediaries could rely in 1980-1984 are wholly unfounded. The importance of the ratios and factors suggested by Mr. Webb easy to understand. Obviously, if the bulk of a reinsurer's policyholder's surplus is made up of a discretionary dollar amount the reinsurer attributes to the value of its subsidiaries, brokers/intermediaries exercising due care should examine the strength of these subsidiaries in an effort to protect its clients and ensure the financial security of the reinsurer. Also, if the bulk of a reinsurer's policyholders surplus is comprised of reinsurance recoverables, the brokers/intermediaries exercising due care need to investigate the quality of the reinsurance recoverables. If these recoverables are with bogus or financially unstable retrocessionaires, the reinsurer's asset is in actuality nonexistent.

Furthermore, what Blanch urges was

being done by it and other intermediaries during the 1980 to 1984 time period not only conflicts with Mr. Webb's testimony but conflicts with the representations and assurances being made by Blanch to Cherokee, specifically, and to the public, generally. The brochures and other advertisements being disseminated by Blanch described its role as "all encompassing" (See Blanch Brochure, p. 4, Appendix hereto). Blanch is in hindsight attempting to minimize the great responsibility it, and other reinsurance brokers/intermediaries were in actuality, assuming during the 1980 to 1984 time period. Cherokee strongly disagrees with the Court of Appeals' holding that insufficient evidence exists to support a judgment against Blanch for negligence in securing reinsurance for Cherokee with Mission, Transit and Mutual Fire.

Alternatively, Cherokee points out to this honorable Court that if Blanch was doing the types of security analyses that other reinsurance brokers/intermediaries were doing during the 1980 to 1984 time period (which Cherokee does not concede), material issues of fact nevertheless exist as to whether the entire brokerage community was negligent.

If the standard of care among reinsurance intermediaries prevalent when Blanch obtained the reinsurance at issue for Cherokee was negligent, and Blanch abided by

such standard, Blanch was negligent.[2] The law is clear that the standard of care in a given profession under specific circumstances is dictated, first, by deference to what is generally accepted custom and practice in the industry; and secondly, by Court designation of such industry custom and practice as the product of careful thought and decision not the product of mere inadvertence, neglect or deliberate disregard of known risks.

Cherokee therefore urges this Court to address the issues of the existence of a duty and scope of the duty owed by the reinsurance broker/intermediary to financially analyze and monitor the financial stability of the reinsures with whom it places a clients business. Cherokee believes that once the important issues of the existence of such a duty and the scope thereof have been

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2 Courts have consistently upheld the view that "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Easterly v. Advance Stores Co.*, 432 F. Supp. 7, 9 (E.D. Tn. 1976); Generally see *Fortune v. Holmes*, 348 S.W. 2d 894 (Ct. App. 1961); and *Baker v. Pidgeon Thomas Company*, 422 F. 2d 744 (6th Cir. 1970) ["Contractors are held both to custom and industry standards and to a standard which would be followed by a reasonably prudent man and must adhere to whichever of the standards is more exacting if he is not to be held negligent."]

reasonably addressed, the evidence will show genuine issues of material fact regarding whether Blanch acted negligently.

II.

THE DECISION OF THE COURT OF APPEALS RAISES A SERIOUS QUESTION OF NATIONAL IMPORTANCE REGARDING THE ROLE OF REINSURANCE BROKER/INTERMEDIARY AND THEIR POTENTIAL FOR LIABILITY

Reinsurance impacts the majority of our nation's insurance companies and their insureds. Consequently, a standard of reasonableness needs to be imposed upon the reinsurance brokerage industry - the industry responsible for selecting reinsurance for a large number of our nation's insurance companies, hence, for their insureds.

Vast discrepancies in size and premium writing exist between the primary insurance brokerage industry and the reinsurance brokerage industry. (See Affidavit of Bernard Webb, p. 4, Appendix hereto). Most primary insurance agencies and brokerage firms are small. (See Affidavit of Bernard Webb, p. 4, Appendix hereto). Blanch, however, had estimated gross revenues of $47.2 million in 1989, with premium volume of $940 million. (See Affidavit of Bernard Webb, p. 5, Appendix hereto).

Undeniably, reinsurance brokers/intermediaries such as Blanch impact our nation and its well-being. The Court of Appeals' decision, minimizing the duty of reinsurance brokers/intermediaries to financially analyze reinsurers selected to meet a client's reinsurance needs, threatens detrimental national consequences. Cherokee respectfully asks this Court to review the decision of the Court of Appeals and render an opinion which ultimately produces a more reasonable definition of the professional responsibility of the reinsurance brokerage industry.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner urges this Court to grant the petition for writ of certiorari.

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